

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BERTHA ORNELAS, o/b/o )  
K.M., a minor child, ) No. CV-07-3098-JPH  
)  
Plaintiff, ) ORDER GRANTING PLAINTIFF'S  
) MOTION FOR SUMMARY JUDGMENT  
) AND REMANDING FOR FURTHER  
) PROCEEDINGS  
v. )  
MICHAEL J. ASTRUE, )  
Commissioner of Social )  
Security, )  
Defendant. )

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on August 18, 2008. (Ct. Rec. 18, 22.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) and remands the matter to the Commissioner for additional proceedings. Defendant's Motion for Summary Judgment (Ct. Rec. 22) is **DENIED**.

## JURISDICTION

The current application for Social Security Income ("SSI")

1 benefits on behalf of a minor child (plaintiff), was protectively  
2 filed on May 5, 2005, alleging disability since that date due to  
3 learning and discipline problems and the need for special  
4 education. (Tr. 42-45, 66.) Plaintiff's treating physician  
5 notes attention deficit hyperactivity disorder (ADHD) by history.  
6 (Tr. 42-45, 323.) The claim was denied initially and on  
7 reconsideration. (Tr. 35-37, 39-41.) A hearing was held on  
8 October 19, 2006, before Administrative Law Judge (ALJ) Peter J.  
9 Baum, at which time testimony was taken from plaintiff's mother,  
10 Bertha Ornelas. (Tr. 334-344.) Plaintiff was represented by  
11 counsel. On February 16, 2007, the ALJ issued a decision finding  
12 that plaintiff was not disabled. (Tr. 16-27.) The Appeals  
13 Council denied a request for review. (Tr. 4-6.) Therefore, the  
14 ALJ's decision became the final decision of the Commissioner,  
15 which is appealable to the district court pursuant to 42 U.S.C. §  
16 405(g). On November 14, 2007, plaintiff filed this action for  
17 judicial review pursuant to 42 U.S.C. § 405(g) (Ct. Rec. 2, 4).

#### **STATEMENT OF FACTS**

19 The facts have been presented in the administrative hearing  
20 transcripts, the ALJ's decision, the briefs of both plaintiff and  
21 the Commissioner and will only be summarized here. When plaintiff  
22 was 4 years old, she was found eligible for special education  
23 services. (Tr. 151.) She received services in the areas of  
24 communication and cognition. (Tr. 152.) At age nine, after  
25 further testing, it was recommended that Plaintiff receive special  
26 education in reading comprehension and written language skills.  
27 (Tr. 151, 156.)

28 Plaintiff was 10 years old at the time of the hearing. (Tr.

1 88, 337.) Ms. Ornelas, plaintiff's mother, testified that  
2 plaintiff is behind in school and takes special education classes  
3 in the afternoon. (Tr. 337-338.) Ms. Ornelas testified that she  
4 needs to ask plaintiff four to five times to do chores; she is  
5 very violent toward her siblings, including throwing things at and  
6 kicking her brothers without provocation. (Tr. 339.) Ms. Ornelas  
7 stated plaintiff has friends at school, was once sent to the  
8 school counseling center, has never been suspended, and repeated  
9 second grade. (Tr. 340.) Ms. Ornelas testified that plaintiff  
10 attended summer school twice in order to be promoted to the next  
11 grade. (Tr. 341.) She stated that after a house fire in  
12 September or October of 2003, plaintiff has had trouble sleeping.  
13 Even though she goes to bed at eight or nine at night, plaintiff  
14 is awake at midnight or one a.m. (Tr. 341-342.) Ms. Ornelas  
15 testified that a teacher called to inform her that on one occasion  
16 plaintiff's head was down, she was tired, and was not paying  
17 attention. (Tr. 342.)

18 **SEQUENTIAL EVALUATION PROCESS**

19 To qualify for disability benefits, a child under the age of  
20 eighteen must have "a medically determinable physical or mental  
21 impairment, which results in marked and severe functional  
22 limitations, and which can be expected to result in death or which  
23 has lasted or can be expected to last for a continuous period of  
24 not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i). Pursuant  
25 to this statutory dictate, the Social Security Administration has  
26 enacted a three-step sequential analysis to determine whether a  
27 child was eligible for SSI benefits on the basis of a disability.  
28 20 C.F.R. § 416.924(a). First, the ALJ considers whether the

1 child is engaged in "substantial gainful activity." *Id.*, at  
 2 § 416.924(b). Second, the ALJ considers whether the child has a  
 3 "medically determinable impairment that is severe," which is  
 4 defined as an impairment that causes "more than minimal functional  
 5 limitations." *Id.* at § 416.924(c). Finally, if the ALJ finds a  
 6 severe impairment, he or she must then consider whether the  
 7 impairment "medically equals" or "functionally equals" a  
 8 disability listed in the regulatory "Listing of Impairments." *Id.*  
 9 at § 416.924(c)-(d); *Id.* at pt. 404, subpt. P. Pursuant to the  
 10 final rules effective January 2, 2001<sup>1</sup>, an impairment will be  
 11 found to be functionally equivalent to a listed impairment if it  
 12 results in extreme limitations in one area of functioning or  
 13 marked limitations in two areas. 20 C.F.R. § 416.926a (a). An  
 14 impairment is a "marked limitation" if it "seriously interferes  
 15 with [a person's] ability to independently initiate, sustain, or  
 16 complete activities." 20 C.F.R. § 416.926a(e)(20(i)). By contrast,  
 17 an "extreme limitation" is defined as a limitation that  
 18 "interferes very seriously with [a person's] ability to  
 19 independently initiate, sustain, or complete activities." 20  
 20 C.F.R. § 416.926a(e)(3)(i).

21 The child's functioning in six domains is assessed, and  
 22 includes determining the child's ability: (1) to acquire and use  
 23

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24 <sup>1</sup>

25 On September 11, 2000, the SSA published the Final Rules  
 26 implementing the Welfare Reform Act, which became effective  
 27 January 2, 2001 (the "Final Rules"). Supplemental Security  
 28 Income; Determining Disability for a Child Under Age 18, 65 Fed.  
 Reg. 54,747 (Sept. 11, 2000) (codified at 20 C.F.R. pts. 404,  
 416). The Final Rules apply because plaintiff's current  
 application was protectively filed May 5, 2005, well after  
 the January 2, 2001, effective date.

1 information; (2) to attend and complete tasks; (3) to interact and  
2 relate with others; (4) to move about and manipulate objects; (5)  
3 to care for oneself, and (6) health and physical well-being. 20  
4 C.F.R. § 416.926a(a)-(b)(2001). In order to demonstrate  
5 functional equivalence under the Final Rules, the child must  
6 exhibit a marked limitation in two of the domains, or an extreme  
7 limitation in one domain. 20 C.F.R. § 416.926a(e)(2)(i).

#### 8 STANDARD OF REVIEW

9 Congress has provided a limited scope of judicial review of a  
10 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold  
11 the Commissioner's decision, made through an ALJ, when the  
12 determination is not based on legal error and is supported by  
13 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
14 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
15 1999). "The [Commissioner's] determination that a plaintiff is  
16 not disabled will be upheld if the findings of fact are supported  
17 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
18 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
19 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
20 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
21 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
22 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
23 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
24 evidence as a reasonable mind might accept as adequate to support  
25 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
26 (citations omitted). "[S]uch inferences and conclusions as the  
27 [Commissioner] may reasonably draw from the evidence" will also be  
28 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).

1 On review, the court considers the record as a whole, not just the  
 2 evidence supporting the decision of the Commissioner. *Weetman v.*  
 3 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
 4 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

5 It is the role of the trier of fact, not this court, to  
 6 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
 7 evidence supports more than one rational interpretation, the court  
 8 may not substitute its judgment for that of the Commissioner.  
 9 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
 10 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
 11 substantial evidence will still be set aside if the proper legal  
 12 standards were not applied in weighing the evidence and making the  
 13 decision. *Brawner v. Secretary of Health and Human Services*, 839  
 14 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
 15 evidence to support the administrative findings, or if there is  
 16 conflicting evidence that will support a finding of either  
 17 disability or nondisability, the finding of the Commissioner is  
 18 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
 19 1987).

20 **ALJ'S FINDINGS**

21 At step one, the ALJ found that plaintiff has not engaged in  
 22 substantial gainful activity. (Tr. 19.) At step two, he  
 23 determined that plaintiff suffers from ADHD. (Tr. 19.) The ALJ  
 24 determined that the evidence of record demonstrated that  
 25 plaintiff's impairment, although severe, does not meet, medically  
 26 equal, or functionally equal the criteria of any of the listings  
 27 impairments. (Tr. 19-26.) With regard to functional equivalence,  
 28 the ALJ concluded that plaintiff does not have an "extreme"

1 limitation in any domain of functioning or a "marked" limitation  
2 in two domains. (Tr. 26.) Accordingly, the ALJ concluded  
3 plaintiff was not under a disability within the meaning of the  
4 Social Security Act. (Tr. 26-27.)

5 **ISSUES**

6 Plaintiff contends that the Commissioner erred as a matter of  
7 law. Specifically, she argues that the ALJ erred at step three by  
8 failing to find that her impairments functionally equaled a  
9 Listing because she is "at least markedly limited in two of the  
10 domains," and by failing to fully develop the record with  
11 respect to plaintiff's psychological impairments. (Ct. Rec. 19 at  
12 12-21.) The Commissioner responds that because the ALJ's step  
13 three analysis is supported by the record, and he fulfilled his  
14 duty to develop the record, the decision should be affirmed. (Ct.  
15 Rec. 23 at 3-13.) The first issue is dispositive.

16 The Court must uphold the Commissioner's determination that  
17 plaintiff is not disabled if the Commissioner applied the proper  
18 legal standards and there is substantial evidence in the record  
19 as a whole to support the decision.

20 **DISCUSSION**

21 A. Step three analysis

22 Plaintiff alleges that the ALJ erred at step three by failing  
23 to find that her impairments functionally equaled the Listings  
24 because she is "at least markedly limited in two domains,  
25 acquiring and using information, and in attending and completing  
26 tasks." (Ct. Rec. 19 at 17-21.) The Commissioner responds that  
27 the ALJ appropriately analyzed the evidence and fulfilled his duty  
28 to develop the record. (Ct. Rec. 23 at 3-13.)

1       In social security proceedings, the claimant must prove the  
2 existence of a physical or mental impairment by providing medical  
3 evidence consisting of signs, symptoms, and laboratory findings;  
4 the claimant's own statement of symptoms alone will not suffice.  
5 20 C.F.R. § 416.908. The effects of all symptoms must be  
6 evaluated on the basis of a medically determinable impairment  
7 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
8 416.929. Once medical evidence of an underlying impairment has  
9 been shown, medical findings are not required to support the  
10 alleged severity of symptoms. *Bunnell v. Sullivan*, 947 F. 2d 341,  
11 345 (9<sup>th</sup> Cir. 1991).

12       A treating or examining physician's opinion is given more  
13 weight than that of a non-examining physician. *Benecke v.*  
14 *Barnhart*, 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or  
15 examining physician's opinions are not contradicted, they can be  
16 rejected only with "clear and convincing" reasons. *Lester v.*  
17 *Chater*, 81 F. 3d 821, 830 (9<sup>th</sup> Cir. 1996). If contradicted, the  
18 ALJ may reject an opinion if he states specific, legitimate  
19 reasons that are supported by substantial evidence. See *Flaten v.*  
20 *Secretary of Health and Human Services*, 44 F. 3d 1453, 1463 (9<sup>th</sup>  
21 Cir. 1995).

22 Acquiring and using information

23       The ALJ notes that on October 26, 2006, Steven Gottlieb,  
24 M.D., opined that plaintiff has less than marked limitation in the  
25 first assessed domain, acquiring and using information. (Tr. 20,  
26 referring to Exhibit 3F at Tr. 326.)

27       With respect to the first domain, the ALJ states:

28       In a July 2005 Childhood Disability Evaluation Form,  
Edward Beaty, Ph. D., consulting psychologist for the

1 Disability Determination Service (DDS), notes that  
2 the claimant is in special education at school. The  
3 doctor opines that the claimant has less than marked  
4 limitations in the domain of acquiring and using  
information (with a recent low average IQ score and  
Woodcock Johns and other academic achievement scores  
from average to borderline). . .

5 In a November 2005 Childhood Disability Evaluation  
Form, G. Gilbert, Ph. D., consulting psychologist for  
6 the DDS opines that the claimant has less than marked  
7 limitations the domain of acquiring and using information  
(with a full scale IQ of 84) . . .

8 (Tr. 19-20.)

9 On May 31, 2005, plaintiff's special education teacher and  
10 case worker, Jennie Mathes, assessed plaintiff's ability to  
11 acquire and use information. (Tr. 112.) Ms. Mathes assessed  
12 "very serious problems" (a rating of 4 on a 1-5 scale) in five  
13 areas: understanding school and content vocabulary, reading and  
14 comprehending written material, expressing ideas in writing,  
15 recalling and applying learned material, and applying problem-  
16 solving skills in class discussions. (Tr. 112.) Ms. Mathes  
17 assessed obvious problems (a rating of 3) in three other areas  
18 within this domain (comprehending and doing math problems,  
19 providing organized oral explanations and adequate descriptions,  
20 and learning new material). (Tr. 112.) Although the ALJ's  
21 finding with respect to this domain mirrors the opinion of her  
22 treating physician, that plaintiff is less than markedly limited  
23 in the ability to acquire and use information, the ALJ does not  
24 discuss Ms. Mathes's assessment with respect to this domain.

25 Attending and completing tasks

26 The ALJ found plaintiff has no limitation in attending and  
27 completing tasks. (Tr. 24.) He gave little weight to treating  
28 physician Dr. Gottlieb's October 26, 2006 opinion that plaintiff

1 has marked limitations in this domain (that may improve with  
2 time). (Tr. 20 referring to Exhibit 3F at Tr. 326.) The ALJ  
3 rejected Dr. Gottlieb's opinion because: (1) it is inconsistent  
4 with the medical record as a whole and with the DDS opinions; (2)  
5 plaintiff showed improvement after only one month of treatment;  
6 (3) the doctor appears to have accepted the claimant's subjective  
7 complaints, and (4) Dr. Gottlieb appears to be advocating for the  
8 patient. (Tr. 21.)

9 On May 31, 2005, plaintiff's special education teacher Jennie  
10 Mathes assessed daily "obvious problems" (rating a 3 out of 5) in  
11 four areas within this domain: carrying out multi-step  
12 instructions, completing homework assignments, completing work  
13 accurately without careless mistakes, and completing work at a  
14 reasonable pace and finished on time. (Tr. 113.)

15 The only evidence relied on by the ALJ in finding no  
16 limitation in the second functional domain appears to be the  
17 opinions of the agency consultants. Testimony of a medical expert  
18 may serve as substantial evidence when supported by other evidence  
19 in the record. *Andrews v. Shalala*, 53 F. 3d 1035, 1041 (9<sup>th</sup> Cir.  
20 1995). Other evidence does not support the ALJ's finding. While  
21 plaintiff showed some improvement in sleep and in her grades on  
22 February 9, 2006, after a month of treatment as indicated (Tr.  
23 318), the opinions of plaintiff's treating physician on October  
24 26, 2006, and teacher in 2005 both support finding a degree of  
25 impairment not endorsed by the ALJ. The ALJ's finding of no  
26 impairment in this domain is not supported by substantial evidence  
27 and free of legal error.

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1           B. Remand

2           "If additional proceedings can remedy defects in the  
 3 original administrative proceeding, a social security case should  
 4 be remanded." *Marcia v. Sullivan*, 900 F. 2d 172, 176 (9<sup>th</sup> Cir.  
 5 1990)(citing *Lewin v. Schweiker*, 654 F. 2d 631, 635 (9<sup>th</sup> Cir.  
 6 1981)). Where the Secretary is in a better position than this  
 7 court to evaluate the evidence, remand is appropriate. See  
 8 *McAllister v. Sullivan*, 888 F. 2d 599, 603 (9<sup>th</sup> Cir. 1989).

9           As noted, the ALJ failed to adequately address the opinions  
 10 of plaintiff's treating physician and teacher when he assessed  
 11 less than marked limitation in the domain of acquiring and using  
 12 information, and no limitation in the domain of attending and  
 13 completing tasks, from the date of onset (May 5, 2005) forward.

14           It is unclear from the record whether plaintiff would be  
 15 found disabled if the relevant evidence was properly analyzed.  
 16 Remand is appropriate because the Commissioner is in a better  
 17 position than this court to evaluate the evidence. See  
 18 *McAllister*, 888 F. 2d at 603. The court expresses no opinion as  
 19 to what the ultimate outcome on remand will or should be. The  
 20 fact-finder is free to give whatever weight to the evidence is  
 21 deemed appropriate. See *Sample v. Schweiker*, 694 F. 2d 636, 642  
 22 (9<sup>th</sup> Cir. 1982) ("Q)uestions of credibility and resolution of  
 23 conflicts in the testimony are functions solely of the  
 24 Secretary").

25           Accordingly,

26           **IT IS ORDERED:**

27           1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) is  
 28 **GRANTED**; the matter is **REMANDED** to the Commissioner for additional

1 proceedings.

2 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is  
3 **DENIED**.

4 3. Judgment shall be entered for **PLAINTIFF**. An application  
5 for attorney fees may be filed by separate motion.

6 4. The District Court Executive is directed to enter this  
7 Order, provide a copy to counsel for Plaintiff and Defendant, and  
8 **CLOSE** the file.

9 **DATED** this 3rd day of September, 2008.

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s/James P. Hutton  
12 JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE  
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